

A Chance to Reflect: Thoughts from the Author of *Floyd v. City of New York*

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I. INTRODUCTION

This August will be the fourth anniversary of my decision in *Floyd v. City of New York*.¹ The good news is that since then the use of stop and frisk in New York has declined by more than ninety percent and there has been no increase in crime.² Indeed, most categories of criminal activity in New York have decreased despite dire predictions to the contrary from the mayor, the police commissioner, and the corporation counsel of the City of New York at the time the decision was issued.³ Indeed, one of New York's venerable tabloids wrote an opinion piece with the elegantly simple theme, stating, "We Were Wrong: Ending Stop and Frisk Did Not End Stopping Crime."⁴

President Donald J. Trump recently tweeted that if a terrorist attack occurs in the future, the judge who stayed his executive order banning certain groups of immigrants will be responsible.⁵ This was not entirely original. Much the same was said by New York's mayor and his chief administrators in 2013.⁶ A judge is only human. While the responsibility for a spike in crime or a terrorist attack falls squarely at the feet of the bad actor(s), it is only natural that a judge worries about the consequences of his or her decision, even when he or she believes that the

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¹ 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

² See Ashley Southall, *Shootings in New York Fall to Lowest Number Since the '90s*, N.Y. TIMES (Jan. 4, 2017), <https://www.nytimes.com/2017/01/04/nyregion/new-york-shootings-decline.html> [<https://perma.cc/4HU2-LUD7>]; *Stop-and-Frisk Data*, N.Y. CIVIL LIBERTIES UNION, <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/VR3M-T3SF>] (last visited Oct. 11, 2017).

³ See Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html> [<https://perma.cc/55KU-6FXL>].

⁴ Editorial, *We Were Wrong: Ending Stop and Frisk Did Not End Stopping Crime*, N.Y. DAILY NEWS (Aug. 8, 2016, 4:10 AM), <http://www.nydailynews.com/opinion/wrong-ending-stop-frisk-not-stopping-crime-article-1.2740157> [<https://perma.cc/A96X-A8ZG>].

⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 12:39 PM), <https://twitter.com/realDonaldTrump/status/828342202174668800> [<https://perma.cc/9VC7-V8G7>].

⁶ See Goldstein, *supra* note 3.

ruling is sound. In short, the lack of any spike in criminal activity resulting from the decrease in stop and frisk has come as a welcome relief.

On the other hand, during the four years that have followed that ruling, there has been a new public awareness of police shootings. Young black males have been grossly over-represented among the victims. Many of those victims were wholly innocent and merely in the wrong place at the wrong time. Other victims were engaged in the most minor criminal activity—such as shoplifting, selling untaxed cigarettes, or driving without a license—but ended up dead at the hands of the police. I say a “new public awareness” because police violence is not new. For decades, there have been close to 1,000 victims of police shootings every year.⁷ What has changed is the visibility of these shootings. Now video cameras often record the event either from a camera mounted on a police vehicle, a camera worn by a police officer, or a cellphone of the victim’s companion or of a citizen observer in the vicinity of the event. These real-time depictions of police encounters and the resulting deaths have shocked the nation and engendered a national discussion regarding racial profiling and police misconduct. Indeed, many police departments are voluntarily adopting the use of dashboard and/or body cameras to provide a real-time record of police-citizen encounters. It is in this context that I provide some reflections on the *Floyd* decision in light of the upcoming fiftieth anniversary of *Terry v. Ohio*.⁸

II. THE FOURTH AMENDMENT, *TERRY*, AND POST-*TERRY*

The Fourth Amendment to the United States Constitution states: “The right of the people to be secure in their persons . . . against *unreasonable* searches and seizures, shall not be violated”⁹ This first clause has come to be known as the Reasonableness Clause.¹⁰ A stop and frisk is a seizure, and possibly a search, and is surely governed by the Fourth Amendment.¹¹ It is fair to say that a seizure occurs when a person’s ability to move on is impeded by police action.¹² A search occurs when the police invade a person’s private space.¹³ Thus, from the earliest times, the elastic concept of what is reasonable has governed the ability of the state actor to make an investigatory stop and conduct a frisk.¹⁴

⁷ See, e.g., Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* 2 n.2 (Nat’l Bureau of Econ. Research, Working Paper No. 22399, 2016), <http://www.nber.org/papers/w22399> [<https://perma.cc/65QB-A47D>].

⁸ 392 U.S. 1 (1968).

⁹ U.S. CONST. amend. IV (emphasis added).

¹⁰ See *Terry*, 392 U.S. at 9.

¹¹ *Id.* at 16.

¹² *Id.* at 16–20.

¹³ *Id.*

¹⁴ *Id.*

The modern phrase has become reasonable suspicion, although the word “suspicion” is not found in the Fourth Amendment. In attempting to define what is reasonable, the Supreme Court stated in *Terry* that the reasonableness of the officer’s conduct in making a stop would be judged by “balancing the need to search [or seize] against the invasion which the search [or seizure] entails.”¹⁵ This, in turn, depends on whether the police can “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”¹⁶ With that standard in mind, the Court held that under the following circumstances the officer had the right to stop *Terry* and two others:

[T]wo men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away.¹⁷

On the same day that *Terry* was decided, the Court held that the stop described in *Sibron v. New York*¹⁸ was not based on reasonable suspicion.¹⁹ The Court described the facts as follows:

The officer . . . merely saw Sibron talking to a number of known narcotics addicts over a period of eight hours. . . . [The officer] was completely ignorant regarding the content of these conversations, and . . . saw nothing pass between Sibron and the addicts. . . . The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual’s personal security.²⁰

In yet a third case that day, *Peters v. New York*,²¹ consolidated on appeal with *Sibron*, the Court found that because the officers had probable cause to arrest *Peters*—more than the reasonable suspicion needed to stop him—his stop passed

¹⁵ *Id.* at 20–21 (alterations in original) (citation omitted).

¹⁶ *Id.* at 21.

¹⁷ *Id.* at 23.

¹⁸ *Sibron v. New York*, 392 U.S. 40 (1968).

¹⁹ *Id.* at 63–64.

²⁰ *Id.* at 62.

²¹ *Peters v. New York*, 392 U.S. 40 (1968).

constitutional muster.²² This conclusion was based on the fact that the officer heard noises at his own door which led him to conclude that someone was seeking to forcibly enter his apartment.²³ When he investigated, he saw two men, whom he had never before seen in his building where he had lived for twelve years, “tiptoeing furtively about the hallway.”²⁴ The officer then left his apartment and the men retreated by bolting down the stairs.²⁵

In sum, these three opinions set forth today’s standard of judging the constitutionality of a stop by whether there has been reasonable articulable suspicion of criminal activity. The key point of these opinions is that officers in the field must make a quick judgment call as to whether what they observed supports a reasonable suspicion of criminal activity and whether they can articulate the basis for their conclusion that they had such a reasonable suspicion. Equally important is what those opinions do not say. They do not provide much, if any, guidance for assessing reasonable suspicion. This has left a significant gap that allows officers in the field tremendous discretion in exercising their judgment as to whether to make a stop, and then tasks judges with the difficult job of reviewing that exercise of discretion—all without an explicit legal framework of what suspicion is reasonable. The very vagueness of the judicially-created standard is the likely culprit for the abuse of the practice of stop and frisk.

In the years following these decisions, the Court has applied the reasonable suspicion standard to many kinds of police activity, often expanding the concept to totally exclude the word reasonable, such as a protective sweep of a home when making an arrest,²⁶ or the search of a car for weapons.²⁷ Other examples include basing a stop on a barely corroborated anonymous tip,²⁸ or conducting sobriety test roadblock stops in the absence of any particularized suspicion.²⁹ In every instance, the officer has a great deal of discretion to determine when a suspicion is reasonable or when a practice is reasonable because its enforcement goals outweigh the intrusiveness of the stop. These cases demonstrate that the Fourth Amendment’s protection against search and seizure in the absence of probable cause has been emasculated by *Terry* and its progeny. The data developed at the *Floyd* trial revealed that nearly 90% of the stops (which are seizures) resulted in no further law enforcement action—no summons, no arrests.³⁰ Of the 52% of stopped persons who were frisked (which is a form of search), only 1.5% of frisks turned

²² *Id.* at 66.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

²⁷ See *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

²⁸ See *Alabama v. White*, 496 U.S. 325, 326–27 (1990).

²⁹ See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 447 (1990).

³⁰ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013).

up a weapon.³¹ It is likely there never was reasonable suspicion of criminal activity supporting these stops, and whatever suspicion existed certainly was far from the probable cause standard set forth in the Fourth Amendment.

III. POLICE ACTIVITY AND THE EXERCISE OF DISCRETION— A PROSPECTIVE ANALYSIS

Given the broad use of stop and frisk by police departments across the country, and the discretion left to officers and judges in defining reasonable suspicion, a number of questions arise that cry out for answers. When does a hunch morph into a reasonable suspicion? When is a decision to conduct a stop wrongly based on racial profiling? How does implicit racial bias affect an officer's exercise of discretion in his subjective evaluation of his observations? What factors are legitimate for an officer to consider in deciding whether he has a sufficiently reasonable suspicion to make a stop? These are some of the questions that pervaded the *Floyd* trial.

The UF-250 form utilized by the New York City Police Department (“NYPD”) applied a check-off-the-box approach for officers to indicate the circumstances that led them to make a stop. The following categories were found on the front or back of the form:

- carrying objects in plain view used in commission of crime, i.e. slim jim/pry bar;
- fits description;
- actions indicative of “casing” victim or location;
- actions indicative of acting as a lookout;
- suspicious bulge/object;
- actions indicative of engaging in drug transaction;
- furtive movements;
- actions indicative of engaging in violent crimes;
- wearing clothes/disguises commonly used in commission of crime;
- other reasonable suspicion of criminal activity; and
- proximity to a high crime area.³²

Many of these categories are undoubtedly vague and call for the officer to make subjective judgments in exercising his or her discretion. The evidence at the *Floyd* trial revealed that the most common bases for stops provided by the officers who completed the forms were “High Crime Area” and “Furtive Movements.”³³ The former is always problematic. Is a person wearing baggy clothes who has a

³¹ *Id.* at 558.

³² *See id.* at 667–68 app. A.

³³ *Id.* at 574.

suspicious bulge in his waist more likely to be engaged in criminal activity if he is walking in the Bronx or walking in Westchester County? The difference, of course, is that the Bronx has a very large African-American population and Westchester County is predominantly white.³⁴ It is not hard to conclude that the unspoken factor leading to a stop of someone in baggy pants with a bulge at his waist is the race of the suspect, not the fact of his walking in a high crime area.

The latter factor is equally problematic. The phrase “furtive movement” is remarkably subjective and vague. What is a furtive movement may well differ when the person making the movement is a member of a suspected group—such as young African-American males.

As Judge Richard Posner of the Seventh Circuit stated in a related context: “Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited.”³⁵ Two other examples noted in the *Floyd* opinion make the same point. President Obama had this to say in a speech he gave on July 19, 2013, after the shooting of Trayvon Martin:

There are very few African-American men in this country who haven’t had the experience of being followed when they were shopping in a department store. That includes me. There are very few African-American men who haven’t had the experience of walking across the street and hearing the locks click on the doors of cars. That happens to me, at least before I was a senator. There are very few African-Americans who haven’t had the experience of getting on an elevator and a woman clutching her purse nervously and holding her breath until she had a chance to get off. That happens often.³⁶

Similarly, in a July 16, 2013 *New York Times* op-ed following the Trayvon Martin shooting, Professor Ekow Yankah of Cardozo Law School wrote:

What is reasonable to do, especially in the dark of night, is defined by preconceived social roles that paint young black men as potential criminals and predators. Black men, the narrative dictates, are

³⁴ U.S. CENSUS BUREAU, POPULATION ESTIMATES OF BRONX COUNTY, NEW YORK & WESTCHESTER COUNTY, NEW YORK, (July 1, 2016), <https://www.census.gov/quickfacts/fact/table/bronxcountybronxboroughnewyork,westchestercountynewyork/PST045216> [<https://perma.cc/6RPY-MLBV>].

³⁵ *Floyd*, 959 F. Supp. 2d at 556 (quoting *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005)).

³⁶ See *id.* at 587 (quoting President Barack Obama, White House James S. Brady Press Briefing Room, Remarks by the President on Trayvon Martin (July 19, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin> [<https://perma.cc/5DKA-BFLW>]).

dangerous, to be watched and put down at the first false move. This pain is one all black men know; putting away the tie you wear to the office means peeling off the assumption that you are owed equal respect. Mr. Martin's hoodie struck the deepest chord because we know that daring to wear jeans and a hooded sweatshirt too often means that the police or other citizens are judged to be reasonable in fearing you.³⁷

The evidence that emerged in the *Floyd* trial substantiated and reinforced these intuitive and anecdotal comments. For example, two officers at the *Floyd* trial testified to their understanding of the term “furtive movements.”³⁸

One [officer] explained that “furtive movement is a very broad concept,” and could include a person . . . “walking in a certain way,” “[a]cting a little suspicious,” . . . being “very fidgety,” . . . “going in and out of a location,” “looking back and forth constantly,” . . . “adjusting their hip or their belt,” “moving in and out of a car too quickly,” “[t]urning a part of their body away from you,” “[g]rabbing at a certain pocket or something at their waist,” “getting a little nervous, maybe shaking,” and “stutter[ing].” Another officer explained that “usually” a furtive movement is someone “hanging out in front of [a] building, sitting on the benches or something like that” and then making a “quick movement,” . . . “going inside the lobby . . . and then quickly coming back out,” or “all of a sudden becom[ing] very nervous, very aware.”³⁹

A number of the other categories on the UF-250 are equally vague. In many suppression hearings that I handled over the years, the question of what constitutes a “suspicious bulge” was hotly litigated. A wallet in a front or back pants pocket causes a bulge. If the wearer of the pants is a white male over fifty, I doubt that any cop would give it a second thought. But if the bulge is seen in the pants worn by a young African-American male, this may well become the basis for a stop. Other examples I have heard or seen include wearing baggy clothing, walking with a particular gait, walking in a group, walking into and out of a building, walking late at night, or driving a particular type of car. The notion that police view these activities as intrinsically suspicious, without factoring in the race of the suspect, strains credulity.

The evidence at the *Floyd* trial also revealed how the interplay of race and reasonable suspicion became a driving force in departmental policy that

³⁷ *Id.* at 587–88 (quoting Ekow N. Yankah, Opinion, *The Truth About Trayvon*, N.Y. TIMES (July 16, 2013), <http://www.nytimes.com/2013/07/16/opinion/the-truth-about-trayvon.html> [<https://perma.cc/LG6Q-VWPD>]; Ekow N. Yankah, CARDOZO LAW, <https://cardozo.yu.edu/directory/ekow-n-yankah> [<https://perma.cc/B8GR-RSZ4>]).

³⁸ *Floyd*, 959 F. Supp. 2d at 561.

³⁹ *Id.* (alterations in original) (citations omitted).

institutionalized the practice of abusing the license to stop and frisk.⁴⁰ Over the years, the NYPD continually pressured officers to increase the number of stops they made on the theory that an increase in stops would lead to a decrease in crime.⁴¹ This pressure translated to the precinct level in terms of productivity quotas—more stops led to more pay and promotions.⁴² Those with a low number of stops were viewed as shirking.⁴³ This caused precinct commanders to encourage officers to stop “the right people, [at] the right time, [in] the right location”⁴⁴—which also served to encourage racially biased policing.

Other institutional failures included ignoring departmental statistics that demonstrated a racial bias in stop patterns; a failure to discipline officers engaging in racially biased policing; and a failure to review training materials to ensure that they were race neutral. Additionally, the evidence revealed a failure of oversight over how stops were conducted and recorded—the documentation of stops was often sloppy and rarely reviewed by any supervisor. And patterns in the recorded bases for stops—such as furtive movements or high crime areas—were accepted without question. Finally, there is at least anecdotal evidence that many stops were made in which the officer failed to make any written record explaining the justification for the stop.⁴⁵

Other evidence during the *Floyd* trial included surreptitious recordings of police talk within certain precincts, which demonstrated the contempt and hostility of supervisors toward the local population. For example, at a roll call on November 8, 2008, at a precinct in Bedford Stuyvesant in Brooklyn—an overwhelmingly black neighborhood—a lieutenant stated:

[W]e’ve got to keep the corner clear. . . . Because if you get too big of a crowd there, you know, . . . they’re going to think that they own the block. We own the block. They don’t own the block, all right? They might live there but we own the block. All right? We own the streets here. You tell them what to do.⁴⁶

At another roll call, the same lieutenant stated that the officers are “not working in Midtown Manhattan where people are walking around smiling and happy. You’re working in Bed-Stuy where everyone’s probably got a warrant.”⁴⁷

⁴⁰ *Id.* at 594–603.

⁴¹ *See id.*

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *Id.* at 604 (alterations in original) (citation omitted).

⁴⁵ *Id.* at 608–09, 611–13, 616–17.

⁴⁶ *Id.* at 597 (alteration in original) (citation omitted).

⁴⁷ *Id.* (citation omitted).

It is amazing how this quote presaged the Supreme Court's recent opinion in *Utah v. Streiff*,⁴⁸ where the Court held that if a person was stopped without reasonable suspicion but turned out to have an open warrant, then any fruits of that unconstitutional stop would not be suppressed.⁴⁹ As pointed out by Justice Sonia Sotomayor in her passionate dissent, approximately 7.8 million people in the United States have an open warrant—mostly for minor offenses such as traffic violations or unpaid fines.⁵⁰ In Ferguson, Missouri, 16,000 of the 21,000 residents have open warrants and St. Louis officers routinely stop people solely to check whether they may have an outstanding warrant.⁵¹ Justice Sotomayor noted that over a four year period in Newark, New Jersey, officers stopped 52,235 pedestrians and ran warrant checks on 39,308 of them.⁵² A Justice Department analysis revealed that 93% of the Newark stops were not supported by reasonable suspicion.⁵³

In a recent op-ed piece by a former Baltimore police officer, titled “When Police Are Poor Role Models,” the author told of an incident where a “sergeant saw a group of young black men on a street corner and told an officer to order them to leave. The officer said he had no reason to do so. ‘Make something up,’ the sergeant replied.”⁵⁴ On another occasion, when the author told a detective that he had made a bad search, a sergeant said, “We don’t care about what happens in court. We just care about getting the arrest.”⁵⁵ He ended his article with the following words: “with the right leadership and training, and if the good officers stay, the department can uproot the attitudes and practices that have poisoned its relationship with the black people of Baltimore and begin an era where the police will be role models for the city and one another.”⁵⁶

The testimony at the *Floyd* trial again confirmed these observations. NYPD officers accepted the notion that they could rely on hunches about criminality (often having an implicit racial bias) without being required to provide any credible explanation for their alleged reasonable suspicion of criminality. The trial record demonstrated that the highest leadership in the department condoned this way of thinking and certainly did nothing to stop it. With respect to identifying whom to stop, Chief Joseph Esposito, the highest ranking uniformed member of the NYPD, testified as follows: “[Stops are] based on the totality of, okay, who is

⁴⁸ *Utah v. Streiff*, 136 S. Ct. 2056 (2016).

⁴⁹ *Id.* at 2062–63.

⁵⁰ *See id.* at 2068 (Sotomayor, J., dissenting).

⁵¹ *Id.* (citation omitted).

⁵² *Id.* (citation omitted).

⁵³ *Id.* at 2068–69 (citation omitted).

⁵⁴ Joseph Crystal, Opinion, *When Police Are Poor Role Models for One Another*, N.Y. TIMES (Aug. 15, 2016), <https://www.nytimes.com/2016/08/15/opinion/when-police-are-poor-role-models-for-one-another.html> [<https://perma.cc/G5AA-S6GM>].

⁵⁵ *Id.*

⁵⁶ *Id.*

committing the—who is getting shot in a certain area . . . *Well who is doing those shootings? Well, it's young men of color in their late teens, early 20s.*”⁵⁷ A deputy inspector was captured on a clandestine tape recording of a roll call making a nearly identical statement: “This is about stopping the right people, the right place, the right location. . . . The problem was, what, male blacks. . . . [A]nd I have no problem telling you this, male blacks 14 to 20, 21.”⁵⁸ In fact, the then-Police Commissioner, Ray Kelly, allegedly said at a meeting that the NYPD focused on stopping young blacks and Hispanics “because he wanted to instill fear in them, every time they leave their home, they could be stopped by the police.”⁵⁹

What this section demonstrates is that the basis for police stops of pedestrians or motorists is a highly subjective judgement on the part of a law enforcement officer that he or she has a reasonable belief that criminal activity is afoot. As the testimony at the *Floyd* trial showed, the reasonable belief is often not based on articulable reasonable suspicion, but rather on instincts based on implicit biases that are rampant in both police departments and our society at large. At the end of the day, the notion that the huge number of stops was justified in the name of fighting crime and efficient policing encouraged officers to rely on implicit biases in their daily policing activity.

IV. JUDICIAL REVIEW, FACT FINDING AND THE EXERCISE OF DISCRETION— A RETROSPECTIVE ANALYSIS

Judges are subject to many of the same biases as others in our society, but they have an additional problem. When a defense lawyer moves to suppress evidence because she believes that the officer lacked reasonable suspicion to stop her client, she must make the difficult decision of whether to allow the defendant to testify at the resulting suppression hearing. If the defendant testifies, it is his word against the word of all the police officers involved in making the stop. Often the defendant has a criminal record and surely has a strong motive to testify falsely, as a conviction will likely mean a jail sentence. The judge, who is tasked with reviewing the facts surrounding the stop through the lens of hindsight, is in a very difficult position. Because the sole issue at the hearing is who is telling the truth, the judge must find one witness credible and the other not. In plain English, this means that the judge believes that either the defendant or the officer is a liar. It is not easy for a judge to find that the officer is a liar. Judges are human and it is unpleasant, to say the least, to suffer the public attack that often follows when a

⁵⁷ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 603–04 (S.D.N.Y. 2013) (emphasis in original) (citation omitted).

⁵⁸ *Id.* at 604 (citation omitted).

⁵⁹ *Id.* at 606 (citation omitted).

judge finds that a police officer has lied and believes—on the flip side—that a criminal has told the truth.⁶⁰

It is therefore not surprising that most suppression motions are denied. During the *Floyd* trial, the City of New York—the defendant in the trial—released a study purporting to show that I had granted more suppression motions than other judges in the Southern District of New York.⁶¹ Of course the study was flawed as it was based solely on a review of written decisions—as opposed to decisions delivered orally from the bench.⁶² I believe that most judges will avoid issuing a written opinion finding an officer’s testimony not to be credible. But the real point is that the flawed study was issued in the middle of the *Floyd* trial to make the case that I was biased against the police because I suppressed evidence in a very small percentage of cases. The obvious purpose was to intimidate me and to condition the public to the notion that because I had suppressed evidence in several criminal cases I was not a “fair” judge.

The good news, however, is that with the advent of cellphone cameras and body cameras, suppression hearings may no longer be a credibility contest. In a number of recent suppression hearings, a defense lawyer has been able to obtain police videos or citizen videos that have demonstrated that the police version of the stop is simply false.⁶³ This incontrovertible proof may be a real game changer in the judicial review of events where the eyewitnesses have traditionally been only the defendant and the police. When a judge is able to review the event in real time—as if she were there at the time of the stop—she can make her own informed decision as to whether there was a basis for a police stop that can withstand constitutional scrutiny.

It is important to note that a judge has enormous discretion in finding facts. Such findings are virtually unreviewable and the judge knows this. It is the judge who sees and evaluates the witnesses. Her findings of fact are reviewed on appeal for abuse of discretion, which is almost never found by a reviewing court. Appellate judges are reviewing a cold record—they neither saw nor heard the witnesses. My point is that judges, like police officers, have wide discretion in assessing whether a police stop was proper, i.e. based on articulable reasonable suspicion that criminal activity was afoot.

⁶⁰ See, e.g., *United States v. Bayless*, 913 F. Supp. 232, 234 (S.D.N.Y. 1996), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996).

⁶¹ See Christopher Dunn, *Suppression Rulings and Views of the Police*, N.Y. L.J. (June 6, 2013).

⁶² See *id.*

⁶³ See Steve Schmadeke, *5 Cops Caught in Lies on Witness Stand, Judge Says*, CHI. TRIB. (Apr. 15, 2014), http://articles.chicagotribune.com/2014-04-15/news/ct-police-testimony-lies-met-20140415_1_police-officers-five-officers-chicago-police [<https://perma.cc/3RUF-YH4J>]; Martha Neil, *Feds Drop Gun Case and Judge Blasts Police After Security Camera Contradicts Officers’ Testimony*, A.B.A. J. (May 16, 2016, 1:23 PM), http://www.abajournal.com/news/article/feds_drop_gun_case_after_video_contradicts_police_testimony_judge_blasts [<https://perma.cc/JK79-LDVQ>].

But unlike a police officer, the judge does not need to make a split-second decision on the street. The judge is a detached actor, with the luxury of time to weigh all of the circumstances. In that sense, the judge is both advantaged and disadvantaged. She can consider the facts from the safety of her perch on the bench, but she was not present as the events unfolded. She cannot know if the defendant looked cocky, threatening, or afraid, or whether the cop made a blatantly racist remark which escalated the encounter. In the absence of a contemporaneous recording, the judge is in a tough spot.

The next question, then, is whether *Terry* has set the right standard. Is it too vague and subject to the personal biases of the officer and then the judge? Should there be a brighter line test? Should the Court have adhered to the probable cause standard of the Fourth Amendment, and would we all be better off if the elastic standard that has been in use for close to fifty years were somehow more definite and less subjective? I am not enamored of the *Terry* decision, a view that is shared by many scholars and commentators.⁶⁴ But the question is always what should replace it?

V. IMPACT ON THE COMMUNITY

The fruits of the elastic *Terry* standard have been devastating to minority communities throughout the United States. In the recent DOJ report on the failures of the Baltimore Police Department,⁶⁵ the practice of indiscriminate police stops was roundly criticized for creating a legacy of discriminatory law enforcement in which black people are disproportionately stopped and searched without cause.⁶⁶ The report noted that from January 2010 to May 2015, 300,000 street stops were made in Baltimore in predominantly black neighborhoods, without reasonable suspicion.⁶⁷ Four hundred ten people were stopped at least 10 times each from

⁶⁴ See, e.g., E. Martin Estrada, *Criminalizing Silence: Hiibel and the Continuing Expansion of the Terry Doctrine*, 49 ST. LOUIS U. L.J. 279, 287 (2005) (“[I]t is clear that the reasonable suspicion standard lends itself to broad applicability. What we are left with, then, is a haphazard, yet one-directional, broadening of police authority during a *Terry* stop.”); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 402 (1988) (“Instead of carving out a narrow exception to probable cause, reasonable suspicion became a valid compromise standard that comports with the [F]ourth [A]mendment if the Court decides that, after balancing the interests, it is reasonable. The government no longer argues against a presumed starting point of probable cause but rather argues for reasonable suspicion as a reasonable accommodation of competing interests. Probable cause becomes merely one point on a continuum of reasonableness.”); Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN’S L. REV. 1133, 1136 (1998) (“A broadly defined reasonableness balancing test . . . largely places the citizen’s Fourth Amendment fate in the hands of others.”).

⁶⁵ CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 5–6 (2016).

⁶⁶ *Id.*

⁶⁷ *Id.* at 5.

2010 to 2015.⁶⁸ Ninety-five percent of those people were African-American.⁶⁹ One black man was stopped thirty times in less than four years, although he was never charged.⁷⁰ The problem with the policy, in part, was that it stressed the quantity of stops over the quality. In Baltimore, 82% of all vehicle stops were of African-Americans, although they made up only 27% of the driving-age population in the greater metropolitan area.⁷¹

Similarly, the DOJ Report that investigated the police department of Ferguson, Missouri, showed a distinct racial bias and the impact of biased policing on the black citizens of Ferguson.⁷² The report concludes that some offenses were almost exclusively charged against African-Americans.⁷³ “For example, from 2011 to 2013, African-Americans accounted for 95% of Manner of Walking in Roadway charges, and 94% of Failure to Comply charges.”⁷⁴ Black drivers were more than twice as likely to be searched after being stopped than white drivers.⁷⁵ Interestingly, contraband was found 26% less frequently with black drivers than with white drivers.⁷⁶ And 90% of the documented use of force by the police in Ferguson was used against African-Americans.⁷⁷ Furthermore, African-Americans are “more likely to receive multiple citations during a single incident,” and “are 68% less likely than others to have their cases dismissed by the [m]unicipal [j]udge.”⁷⁸ In 2013 alone, “African-Americans accounted for 92% of cases in which an arrest warrant was issued.”⁷⁹ In addition to the Manner of Walking in Roadway charges and Failure to Comply charges, African-Americans account for “92% of all Resisting Arrest charges; 92% of all Peace Disturbance charges; and 89% of Failure to Obey charges.”⁸⁰ A report written by the Vera Institute for Justice showed that because of the large number of police stops of young African-American males, the community is very distrustful of the police and often refuses to cooperate with them in any way.⁸¹ Even if a person has observed a crime, he

⁶⁸ *Id.* at 7.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62–63 (2015).

⁷³ *Id.* at 4.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 5.

⁷⁸ *Id.* at 63.

⁷⁹ *Id.*

⁸⁰ *Id.*

will not report it to the police or will refuse to assist in an investigation. The distrust sown by years of unwarranted police stops has alienated the community. This is a bad result for both the police and the community.

The other consequence of the overuse of *Terry* stops is that too many young African-American males end up with an arrest record, although not necessarily a conviction. But this means that they have been fingerprinted, they may have spent a night in jail, and they may have been held in prison unnecessarily because they were unable to raise bail. Today, this may also mean that the person wrongfully stopped may be quickly deported if he is found to be an undocumented alien, even if he is only arrested. The fact that the charges are often dismissed is of little comfort to those who have had this experience. Even when the stop does result in the seizure of contraband—usually very small amounts of marijuana—this just means that more African-Americans and Hispanics—the usual targets of these stops—end up with criminal records for very minor crimes. This over-criminalization effect has had a devastating effect on minority communities.

VI. A BETTER MODEL AND A BETTER FUTURE

Many police departments have moved away from the use of the stop and frisk model, as defined by *Terry*, and are now experimenting with different methods of policing that may be more effective and may improve police-community relations. These include community policing, hotspot policing, focused deterrence, problem-solving policing, and use of predictive algorithms. It is for other contributors to this symposium issue to describe in more detail the new forms of policing and to assess whether they are successful. Suffice it to say from my point of view as the trial judge in the *Floyd* case that the move away from stop and frisk is most welcome. I am hopeful that, unless the new President and new Attorney General move policing backward, we are on the way to a better system of law enforcement that will both reduce crime and improve community relations. And best of all, it is my hope that the new order will bring much needed fairness to the criminal justice system as a whole.

⁸¹ JENNIFER FRATELLO ET AL., VERA INST. OF JUSTICE, COMING OF AGE WITH STOP AND FRISK: EXPERIENCES, PERCEPTIONS, AND PUBLIC SAFETY IMPLICATIONS 42, 48–49 (2013), http://archive.vera.org/sites/default/files/resources/downloads/stop-and-frisk_technical-report.pdf [https://perma.cc/9TD C-XXSZ].